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# Supreme Court of the United States

**OCTOBER TERM, 1933**

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**No. 561**

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INTERNATIONAL MILLING COMPANY,

PETITIONER,

*vs.*

COLUMBIA TRANSPORTATION COMPANY,

RESPONDENT.

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## Brief for Respondent

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### STATEMENT

While petitioner's Statement of Facts (Brief, 3 to 7) indicates in general the case, we deem it advisable to restate the facts somewhat more in detail.

Both the petitioner, plaintiff below, and the respondent, defendant below, are foreign corporations, not residents of Minnesota. Both are incorporated under the laws of Delaware. Respondent is not qualified under the Minnesota law, and does not operate any property in Minnesota; it carries on no activities in the State, except those incidental to transportation of cargoes by water in interstate business (R. 15), maintains no office in the State, has no general agent in the State and navigates its vessels to the port of Duluth-Superior only over navigable waters of the United States.

On or about December 13, 1929, the Columbia Steamship Company, an Ohio corporation, entered into a contract at Cleveland, Ohio, through D. Sullivan & Company, agents, with International Milling Company, a Delaware corporation, for the storage at South Chicago of a cargo of grain to be held in the Steamer "W. C. Richardson", and thereafter transported to Buffalo after the opening of navigation in the spring of 1930, and there unloaded (R. 40). Pursuant to that contract, as stated in the complaint (R. 3), the cargo was loaded on the Steamer "W. C. Richardson" (not the vessel attached in this action) about January 1, 1930, and was held in storage at South Chicago until about May 1, 1930, when it was transported to Buffalo, New York, arriving there on or about May 7th. Some days thereafter part of the cargo was discovered to be damaged, whereupon the cargo was unloaded and reconditioned. The damage sustained, as stated in the complaint (R. 5), amounted to something over $19,000.00. It does not appear whether the damage to the grain occurred during the storage period at South Chicago, or while on voyage, or whether after arrival at Buffalo. Neither during the storage nor during the transportation was the "Richardson" within the State of Minnesota, and there is no claim that the contract was made, or that the damage to the grain was sustained, in Minnesota.

To recover for the damage, petitioner, International Milling Company, filed a libel in admiralty in the United States District Court at Buffalo, New York, in rem against the said Steamer "W. C. Richardson", then owned by the Columbia Steamship Company. The damages sought in that suit were the same and arose out of the same cause of action, as those involved in the present case. The "Richardson" was seized and duly released by the filing of a bond. Exceptions were filed to the libel on the ground

that admiralty had no jurisdiction over the winter storage portion of the contract. The exceptions were sustained, the libelant being given 20 days within which to amend, and the case was dismissed at libelant's costs when no amended libel was filed (R. 21). During the pendency of the proceeding in the Admiralty Court at Buffalo, libelant's attorneys inquired whether the Columbia Steamship Company would enter appearance and defend in an action to recover for the alleged damages to be brought at law in the State or Federal Court at Buffalo (R. 21). On or about February 4th, 1931, the Columbia Steamship Company, by its attorneys, agreed that it would enter appearance and defend in an action at law to be brought in United States District Court at Buffalo (R. 21).

Such action was never instituted. The next proceeding was a suit brought by Chance W. Clark, a citizen of Ohio, as assignee of petitioner, in the District Court of St. Louis County, Minnesota, at Duluth, against the Columbia Steamship Company, an Ohio corporation. Service of process and a writ of attachment in this action were vacated for the reason that to allow the action to proceed would have operated to place an unreasonable condition, burden and restraint on interstate commerce (R. 24-25). The order in that case was entered on February 29, 1932 (R. 25).

Respondent in the present proceeding, Columbia Transportation Company, of Delaware, was incorporated on or about November 5, 1931, and on or about December 28, 1931 (R. 19), acquired and took over the property, business and activities of the Columbia Steamship Company, of Ohio, including the steamers that were owned by said Steamship Company (among others the Steamers "W. C. Richardson" and "C. Russell Hubbard"), and assumed

the liabilities of said Columbia Steamship Company. The Columbia Steamship Company thereupon discontinued business.

The present suit against Columbia **Transportation** Company was instituted on or about June 17, 1932, in the State District Court at Duluth, Minnesota, by the International Milling Company to whom the cause of action herein involved presumably was reassigned by Chance W. Clark. Purported service of summons was made upon the Captain of the "C. Russell Hubbard", a ship owned by respondent, and writ of attachment was levied upon said vessel while moored at a dock at Allouez, Wisconsin, there being unloaded by the dock crew (R. 14). The Steamer was released upon the filing of bond.

Respondent, Columbia Transportation Company, of Delaware, and the Columbia Steamship Company, of Ohio, before it discontinued business, had operating offices in Cleveland, Ohio (R. 17); neither ever had any agents in Minnesota, except as from time to time an agent might be designated under limited authority to sign bills of lading or perform such other services as might be necessary to enable their ships to engage in interstate or foreign commerce. All cargoes for said steamers were arranged through the offices of the respective companies at Cleveland. Neither company solicited business in Minnesota and neither company made or performed any contracts within that State or carried on any activities therein, except as incidental to the shipping and delivery of cargoes in interstate and foreign commerce (R. 16). From the time of its incorporation up to the time of bringing of this suit respondent, Columbia Transportation Company, of Delaware, operated but one steamer, the "C. Russell Hubbard" (R. 16).

The Minnesota Supreme Court summarized the activities of the respondent as follows:

> "Defendant has no office or agent and does no business in or local to Minnesota. Occasionally it discharges interstate cargoes at Duluth" (R. 68).

The record shows that none of defendant's witnesses reside in Minnesota, the witnesses upon whom it must rely residing in Wisconsin, Michigan, Illinois and New York. The Trial Court found, and the Supreme Court of Minnesota considered that finding controlling upon it, "that the defendant would be greatly harassed by having to defend the action in Minnesota" (R. 69).

Petitioner in its Statement of Facts (Brief, bottom page 3), says that the Columbia Transportation Company "operates its vessels in interstate commerce in Minnesota waters", and on page 4, that respondent "operates all of its vessels which touch the ports of Duluth, Minnesota, and Superior, Wisconsin, over approximately ninety miles of water over which the State of Minnesota has territorial jurisdiction", referring to page 42 of the record. These statements are based on the affidavit of H. A. Carmichael. This affidavit merely states that the vessel attached "proceeded about ninety miles through waters over which the State of Minnesota and the State of Wisconsin had concurrent jurisdiction." These statements are confusing in that distinction is not made between the waters within the boundaries of Minnesota, as defined in the Constitution, and the waters outside of these boundaries over which Minnesota is given *concurrent* jurisdiction. And in petitioner's statement is a further misapprehension respecting the character of the waters traversed by respondent's ship in that whether these waters are within the territorial limits of Minnesota or within the concurrent jurisdiction of that

State, they are not State waters but navigable waters of the United States. The record shows that the ship attached in this action, prior to the attachment, had not come into Minnesota or Minnesota waters (R. 13).

Respondent appearing specially in the State District Court, moved that the service of summons and levy of writ of attachment be set aside and vacated for the reason that to allow the action to proceed would place unreasonable conditions, burdens and restraints upon interstate commerce (R. 12). The District Court granted that motion. The Supreme Court of Minnesota sustained the ruling of the District Court (R. 76, 81). (250 N. W. 186, 190).

## SUMMARY OF ARGUMENT

I. Maintenance of a Suit against a Foreign Corporation engaged in Interstate Commerce on a Cause of Action arising outside the State is, in the Absence of Consent, an Unreasonable Burden on Interstate Commerce.

II. This Burden is Objectionable regardless of the Nature of the Process employed to subject the Defendant to Jurisdiction.

III. It is the Burden upon the Defendant which renders the Maintenance of such an Action Objectionable.

IV. Petitioner is not a Resident of a Citizen of Minnesota.

V. Even though Petitioner were a Resident, which is denied, this would not permit imposition of the Burden.

VI. Respondent had neither consented to be sued in Minnesota nor was it carrying on such business there as to warrant the maintenance of this Action.

VII. The Judgment of the Supreme Court of Minnesota should be Affirmed.

## ARGUMENT

### I.

**Maintenance of a Suit against a Foreign Corporation engaged in Interstate Commerce on a Cause of Action arising outside the State is, in the Absence of Consent, an Unreasonable Burden on Interstate Commerce.**

This Court, further developing its previous decisions relative to actions against non-residents, has clearly established the doctrine that the maintenance of a suit unconnected with the State against a foreign corporation engaged in interstate commerce on a cause of action arising outside the State, unreasonably burdens interstate commerce.

*Davis v. Farmers' Co-operative Equity Co.*, 262 U. S. 312;

*Atchison T. & S. F. R. Co. v. Wells*, 265 U. S. 101;

*Michigan Central R. Co. v. Mix*, 278 U. S. 492;

*Denver & R. G. W. R. Co. v. Terte*, 284 U. S. 284.

The first case decided by this Court, so far as we have been able to find, which, basing its holding expressly on the commerce clause, holds that such an action may not

be maintained, is the case of *Davis v. Farmers' Co-operative Equity Co.*, supra. In this case a Kansas corporation instituted a suit in Minnesota against another Kansas corporation to recover for loss of grain in transit between two points in Kansas. The defendant maintained in Minnesota an agent for the solicitation of traffic, but neither owned nor operated any trackage in Minnesota. Service was attempted to be made upon the local soliciting agent under a Minnesota statute permitting such service. The State Court held the service of process valid, whereupon the matter was appealed to this Court which held that the Minnesota statute "by requiring from interstate carriers general submission to suit * * * unreasonably obstructs, and unduly burdens interstate commerce," and that the purported service of process was invalid.

This case was followed by the case of *Atchison T. & S. F. R. Co. v. Wells*, supra, in which the facts were substantially similar to those in the Davis case, except that jurisdiction over the foreign corporation was attempted to be secured by garnishment and attachment of property located in Texas, where the suit was pending. This Court held that the Texas garnishment statute, when construed and applied so as to permit a citizen and resident of another state to prosecute in Texas a cause of action which arose elsewhere, against a railroad corporation of another state engaged in interstate commerce, and which neither owned nor operated a railroad in Texas, and which had not consented to be sued there, was invalid as placing an unreasonable burden upon interstate commerce.

In the case of *Michigan Central R. Co. v. Mix*, supra, the plaintiff, a resident of Missouri who had become such after the cause of action accrued but before suit was

instituted, sued a Michigan railroad corporation which maintained a soliciting agent in Missouri but which did not have a line in Missouri, on a cause of action which accrued in Michigan. This Court, following its previous decisions, held that the fact that the plaintiff had acquired residence in Missouri prior to the institution of suit was not sufficient to make the burden reasonable.

In the case of *Denver & R. G. W. R. Co. v. Terte*, supra, plaintiff who, although not a resident of Missouri when the cause of action arose, had become a bona fide resident and citizen of Missouri at the time of institution of the suit, sued the Atchison T. & S. F. R. Co. and the Rio Grande in Missouri for injuries occurring in Colorado. It appeared that the Santa Fe owned a railroad line in Missouri, was licensed to do business in Missouri and apparently there carried on an intrastate business. It was held that the maintenance of the suit in Missouri against the Santa Fe did not constitute an unreasonable burden upon interstate commerce. The Rio Grande was a Delaware corporation, and although it owned and used property in Missouri, maintained offices in the State and there employed agents who engaged in transactions incident to the procurement and delivery of traffic to be carried by it, the Rio Grande had not qualified to do business and did not own or operate any trackage within Missouri. Despite the fact that the Rio Grande owned property located in the State and had agents apparently permanently located there engaged in transactions incident to the procurement and delivery of traffic, this Court held that the maintenance of a suit in Missouri, although jurisdiction over property in the State belonging to the Rio Grande had been secured by garnishment, constituted an undue burden upon interstate commerce.

In three cases cited by petitioner where this defense was raised, this Court sustained jurisdiction. These cases are:

*Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor*, 266 U. S. 200;

*Hoffman v. Missouri ex rel. Foraker*, 274 U. S. 21;

*Denver & R. G. W. R. Co. v. Terte*, 284 U. S. 284 (as to Santa Fe).

The Taylor case does not involve the doctrine of the Davis and Wells cases, the question now presented for the decision of this Court, for the Taylor case was considered as one in which suit was brought in the jurisdiction where the cause of action accrued. While certain other matters are mentioned in the opinion in the Taylor case as possibly justifying jurisdiction, that this is the true basis of the decision in that case seems clear from the language of this Court in the Mix case where, at page 495, this Court says:

> "In Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor, supra, it appeared that the shipment out of which the cause of action arose was of goods deliverable in Missouri; and also that the negligent acts complained of may have occurred within the state."

Clearly the Hoffman case, supra, did not present the situation here presented for review. As stated in the opinion in that case (page 22):

> "Here the railroad is not a foreign corporation; it is sued in the state of its incorporation."

In the Terte case, supra, where jurisdiction was sustained as to one of the defendants, the Santa Fe, that

defendant not only was doing a local business when sued, but had qualified to do business in the State. The Court specifically sustained jurisdiction on the basis of the Hoffman case.

Thus it is to be noted that the Davis, Wells, Mix and Terte (Rio Grande) cases presented no facts from which the Court could infer a consent, express or implied, to be sued in the State where the action was brought, and hence jurisdiction was denied. In the Hoffman and Terte (Santa Fe) cases jurisdiction was sustained, there being consent to be sued in the State where the action was brought through incorporation (Hoffman case) or qualification (Santa Fe) under the laws of the State. In the Taylor case suit was instituted in the State where the cause of action arose and is, therefore, not analogous to the present suit.

## II.

### This Burden is Objectionable regardless of the Nature of the Process employed to subject the Defendant to Jurisdiction.

The burden upon interstate commerce resulting from a suit against a foreign corporation on a cause arising outside the State cannot be circumvented through employment of a particular kind of process. That this is so, is clear from the adjudications of this Court.

*Atchison T. & S. F. R. Co. v. Wells*, 265 U. S. 101;

*Denver & R. G. W. R. Co. v. Terte*, 284 U. S. 284.

Thus, in the Wells case jurisdiction was secured by garnishing rolling stock and traffic balances within the

State. In holding the garnishment improper, this Court, at page 103, said:

> "But the writ of garnishment is void because of the purpose for which it was invoked. * * * The Texas statutes concerning garnishment were construed and applied in the Wells suit so as to permit a citizen and resident of another state to prosecute in Texas a cause of action which arose elsewhere, against a railroad corporation of another state, which is engaged in interstate commerce, which neither owns nor operates a railroad in Texas, and which has not consented to be sued there."

In the Terte case this Court, at page 287, said:

> "The prohibition against burdening interstate commerce cannot be avoided by the simple device of a joint action. Nor can this be evaded merely by attaching the property of the non-resident railroad corporation. Obviously, the burden and expense which the carrier must incur in order to make defense in a state where the accident did not occur has no relation to the nature of the process used to bring it before the court."

## III.

**It is the Burden upon the Defendant which renders the maintenance of such an action objectionable.**

While this Court has perhaps laid down no specific rules as to when such an action will or will not be objectionable, it is clear from the adjudicated cases that it is the *burden imposed upon the defendant* which renders the maintenance of the action objectionable and that in the absence of facts which render it clearly reasonable to impose the burden, the maintenance of the suit will not be allowed.

On this point the decisions of this Court are summarized in the Terte case as follows:

> "And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this."

Petitioner, on pages 21 to 25 of its brief, urges that under decisions of this Court the question of convenience or inconvenience of transporting witnesses to the State where jurisdiction is sought, is not of material importance. But as stated above, it is the burden upon interstate commerce which renders the maintenance of such suit improper, and the necessity of the carrier bringing witnesses from a distance is of importance in the determination of this branch of the matter. Thus, in the Davis case this Court said, at page 315:

> "That the claims against interstate carriers for personal injuries and for loss and damages of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative or advisable to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers,—these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden upon interstate carriers, imposed specifically by the statute here assailed, is a heavy one; and that the resulting obstruction to commerce must be serious."

In the Terte case it was upon affidavits showing that the trial of the case would require the attendance of

witnesses from Colorado that the Court dismissed the action as against the Rio Grande.

Petitioner argues that the fact that in the Hoffman case and in the Terte (Santa Fe) case jurisdiction was sustained, even though in a state where the cause of action did not arise, indicates that the inconvenience of transporting witnesses is not important. In the Hoffman case the defendant railroad was sued in the jurisdiction of its incorporation where clearly it had consented to be sued. Petitioner argues that the fact that Missouri was the State of defendant's incorporation in this case was not considered important. On the contrary, this was the controlling feature in that case, as shown in the case of *Michigan Central v. Mix* where this Court says, at page 495, in referring to the Hoffman case:

> "* * * the railroad was organized under the laws of the state, and operated a part of its line in the county in which the action was brought."

In the Terte case, the Santa Fe, the defendant against whom the Court held jurisdiction might be sustained, not only was doing business in the State but had qualified under the laws of the State, this resulting in a consent to be sued in that jurisdiction.

## IV.

### Petitioner is not a Resident or a Citizen of Minnesota.

In the instant case the plaintiff is not an individual but a corporation organized under the laws of Delaware. The so-called "residence" of the plaintiff in Minnesota is purely the result of a presumption that it has qualified to do business in Minnesota.

A Delaware corporation cannot and does not acquire a residence in Minnesota by reason of maintaining in the State a place of business, even if its principal business is there transacted. The rights of a citzen of one State to the privileges and immunities of citizens of other states are limited to natural persons and do not extend to corporations which are considered to be citizens of the State where created. The privilege of such corporation to do business in a State other than that of its creation, is permitted by comity alone, and does not rest upon any natural right,—being an artificial person it has no natural rights. A corporation cannot be considered a citizen and an inhabitant or a resident of a State in which it is not incorporated.

By an unbroken line of decisions of this Court it has been uniformly held that for purposes of jurisdiction the residence of a corporation is considered to be in the State where incorporated, regardless of its doing business elsewhere.

See *Germania Fire Insurance Co. v. Francis,* 11 Wall. 210, where in the opinion, page 216, it is said:

> "Unlike a natural person, it (a corporation) cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

In *ex parte Schollenberger,* 96 U. S. 369, it is said at page 377:

> "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; * * *"

In *Penn. R. Co. v. St. Louis, Alton & Terre Haute R. Co.*, 118 U. S. 290, in discussing the question of jurisdiction this Court said, at page 295:

> "It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also."

See also *Shaw v. Quincy Mining Co.*, 145 U. S. 444, in which case, after reviewing earlier cases laying down the general doctrine that a corporation is considered a resident only of the State in which it is incorporated, this all-inclusive language is used, at page 450:

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence; the home, the domicile, the habitat, the residence, the citizenship of the corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it."

In the quite recent case of *Seaboard Milling Co. v. Chicago, etc., Railway Co.*, 270 U. S. 363, the principle set forth in the earlier case is reaffirmed. In this case the milling company brought an action at law against the railway company in the United States District Court, for the Eastern District of Missouri. The milling company was a corporation organized under the laws of Texas and the railway company was a corporation organized under the laws of Illinois and Iowa, having its principal office in Chicago, but maintaining a branch office and operating a branch line within the Eastern District of Missouri. The railway company, appearing specially, filed a plea to the jurisdiction on the ground that neither it nor

the milling company was a resident or inhabitant of the district. The plea was sustained and the action in sustaining this plea was affirmed by this Court, saying at page 366:

> "It is immaterial whether the general Federal jurisdiction in the present suit is founded upon diversity of citizenship alone, or whether the suit is also one arising under the laws of the United States, since neither the Milling company nor the Railway company is a resident of the eastern district of Missouri; a corporation being, within the meaning of the jurisdictional statutes, a resident of the state in which it is incorporated, and not a resident or inhabitant of any other state, although it may be engaged in business within such other state."

The decisions under the statute relating to removal of actions from State to Federal Courts on the ground of diversity of citizenship, are applicable to the present question. In *Southern Railway v. Allison,* 190 U. S. 326, it was held that although the state statute provides that a foreign railroad corporation, on complying with certain provisions of a state statute "shall become a domestic corporation, such fact does not affect the character of the original corporation and it does not thereby become a citizen" of the second state, "so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship". And to the same effect is *Missouri Pacific Ry. Co. v. Castle,* 224 U. S. 541.

## V.

**Even though Petitioner were a Resident, which is denied, this would not permit imposition of the Burden.**

Petitioner, at pages 25 to 29 of its brief, argues that because the plaintiff must be presumed to have qualified to do business in Minnesota that it is in legal effect a resident of Minnesota, and that this fact justifies the maintenance of the suit in Minnesota.

That petitioner, however, does not rely upon this point seems clear from its own statements (Petitioner's Brief, 16, 17, 22) of the principles which it considers to be involved. In these statements the matter of the residence of the plaintiff is not mentioned as a material element.

While it is true that in the Davis case this Court left open the question of what, if any, effect the fact that the suit was instituted in the jurisdiction of which the plaintiff was a resident at the time of the accrual of the cause of action might have, it is submitted that this question has since been determined in the Terte case adversely to the position taken by petitioner that residence of the plaintiff is of importance.

Petitioner on this branch of the case places great reliance upon the case of *Cressey v. Erie R. Co.*, 278 Mass. 284, 180 N. E. 160. It is submitted that not only does the Cressey case not cover the situation in this case, but that it proceeds upon a misconception of the cases decided by this Court.

The Court in the Cressey case bases its entire argument upon the premise that the question involved is one of the balancing of interests and that in this balancing

the inconvenience to the plaintiff is an important and material element. It is submitted that this Court in the Terte case held that this could not be undertaken by the Court, and, at page 287, said:

> "The alleged residence in Missouri of persons whose testimony plaintiff supposed would be necessary to prove his claim was not enough to justify retention of jurisdiction by the Circuit Court. While this circumstance might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden upon interstate commerce. And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this. * * * Further, as a practical matter, courts could not undertake to ascertain in advance of trial the number or importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconvenience of the parties."

It is further to be noted that in the Cressey case, the plaintiff was an individual, and was not only a resident, but was also a natural citizen of Massachusetts. The Massachusetts Court placed great weight upon the right of a natural citizen to seek redress of his grievances in the Courts of his sovereign.

While it seems clear under decisions of this Court that the rule of the Cressey case is wrong even as applied to a natural citizen, if the "corporate residence" theory of the petitioner is to obtain and a foreign corporation, through qualifying in other states, is to be accorded the privileges and rights which the Massachusetts Court thought belonged to a natural citizen, it is possible, if not probable, that many corporations would be in a posi-

tion to demand these rights and privileges in the Courts of forty-eight different jurisdictions.

It should also be noted that in the Cressey case the Court said:

> "* * * and (plaintiff) has not sought relief in the courts of any foreign jurisdiction."

Petitioner's first action seeking to recover for the damage here in question, was instituted in admiralty in the District Court of the United States at Buffalo against the Steamship "Richardson", the property of the Columbia Steamship Company. This action was dismissed. Despite an agreement (made at petitioner's request) on the part of the Columbia Steamship Company to accept service in an action at law in the United States District Court at Buffalo, there followed an assignment of the claim to a resident of Ohio who sued the Columbia Steamship Company in Minnesota. Upon the dismissal of this action the claim was reassigned to the petitioner and this suit instituted.

Petitioner, at pages 26 and 27 of its brief, takes the position that because the plaintiff's residence in the Mix and Terte cases was acquired before suit but after the cause of action had arisen, the question of the effect of the plaintiff's residence has not been determined by this Court.

It is true that in the Mix case this Court pointed out that plaintiff had changed her residence after the accrual of the cause of action, and, for aught that appeared, solely for the purpose of bringing suit in Missouri. In the Terte case, however, the Court found that the plaintiff's removal had been bona fide, and did not place any weight in the determination of that case upon the fact

that plaintiff's residence was acquired after the accrual of the cause of action.

Not only is it submitted that the question of the effect of plaintiff's residence has been determined adversely to petitioner, in the Terte case, but it is submitted that this decision is clearly sound. Even assuming petitioner's argument in relation to the balancing of interests, the interest of a plaintiff in being allowed to sue in the forum of his domicile because of the inconvenience of being forced to go elsewhere, is an interest in being allowed to sue in the forum of his domicile at the time of the institution of the suit and not the forum of his domicile at the time of the accrual of the cause of action.

To say that it is more convenient for a plaintiff to be forced to go away from the state of which he is a resident at the time of the institution of the action, to the state of which he was a resident at the time of the accrual of the action, than to go to the state where the cause of action accrued, would involve a careful weighing of convenience which this Court in the Terte case (page 28) has said no court could undertake to ascertain in advance of trial.

It therefore seems clear that if the matter of a plaintiff's residence is of any practical importance as a matter of balancing conveniences, it is the residence at the time the action is instituted. That residence at this time is of no controlling importance is definitely determined in the Terte case where this Court held that suit against one defendant was a burden, whereas suit by the same plaintiff in the same court on the same cause of action but against a different defendant was not a burden.

In this connection it should be stated that there is no benefit to petitioner, International Milling Company,

so far as expenses are concerned, in having the action tried at Duluth rather than at Buffalo or Cleveland or Chicago. All of the witnesses for the Milling Company, who would know anything about the damage, presumably live at Chicago or at Buffalo.

It is submitted that the true doctrine enunciated by this Court in the Davis case and succeeding cases is that regardless of the residence of the plaintiff, a suit against a foreign corporation in a jurisdiction unconnected with the cause of action constitutes a burden upon interstate commerce and cannot be maintained unless defendant has either expressly consented to be sued there, or its operations in the State are of such a character that consent must necessarily be implied.

## VI.

### Respondent had neither consented to be sued in Minnesota nor was it carrying on such business there as to warrant the maintenance of this action.

Petitioner states at page 21 of its brief, that "Four of the seven Justices of the Minnesota Supreme Court ignored or regarded as of no controlling importance * * * the fact that defendant here was operating its facilities regularly within the State of Minnesota, as surely as does a railroad."

The majority of the Justices of the Minnesota Supreme Court did not disregard the question of respondent's operations in the State of Minnesota but, on the contrary, considered it and resolved it adversely to petitioner's claim as shown from the following language of Mr. Justice Stone, who wrote the prevailing opinion. In comparing the instant case with the Terte case he said:

> "It (referring to the Rio Grande) was as much, but no more, out of Missouri in a physical sense and for all business purposes, as the defendant in the instant case is out of Minnesota" (R. 70).

Petitioner argues that the controlling feature is whether or not the defendant is operating within the State. As stated above, we believe that the true rule is whether the defendant has consented to be sued within the State either expressly (as a result of being incorporated under the laws of the State, as in the Hoffman case, or having qualified to do an intra-state business as the Santa Fe in the Terte case,) or as a result of doing business within the State, of such a character that consent to be sued there must be implied.

The doing of business by a foreign corporation in a state other than that in which it was created, has often been a matter of consideration by the courts including this court. See *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, where, in the opinion, p. 86, this language is used:

> "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted."

See also *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264.

Petitioner in its brief endeavors to give the impression that the activities of respondent in Minnesota were similar to the activities of a railroad having trackage within the State and there operating a railroad line on regular schedule. It repeatedly says that the respondent

was operating its vessels "over Minnesota waters" (Brief pp. 3, 14, 15, 16), over "approximately ninety miles of water over which the State of Minnesota has territorial jurisdiction" (pp. 4, 12, 29); that it "operates a *line* of vessels" (pp. 14, 15, 16) *regularly* within the State (pp. 21, 22).

That the respondent was not operating a "line" of vessels "regularly" over "ninety miles" of Minnesota "territorial waters" is clearly shown by the record.

Respondent is a Delaware corporation (R. 15). It is engaged exclusively in the transportation of freight in bulk by water in interstate and foreign commerce. It has not been admitted to Minnesota as a foreign corporation. It has not consented to be sued there. It carries on no activities there except those incidental to the occasional delivery of an interstate cargo to Minnesota (R. 16). It maintains no office in the State, solicits no business there, has no agent or officer present, and navigates its vessels into the port of Duluth-Superior only over the navigable waters of the United States. Respondent only occasionally employs a man in Minnesota with a limited authority to perform certain duties incidental to the interstate carriage of its freight (R. 16). Up to the time of the purported attachment in this case the respondent was operating only one vessel, the "C. Russell Hubbard", which was not the vessel in connection with which this suit was brought, and it operated this vessel into Minnesota upon no regular schedule, but only as it secured cargoes from ports in other States or foreign ports destined to Minnesota.

The Minnesota Supreme Court, on appeal from the order of the trial court setting aside the service of sum-

mons and vacating the writ of attachment, found that the respondent did

> "* * * no business in or local to Minnesota. Occasionally it discharges interstate cargoes at Duluth" (R. 68).

It is submitted that this decision of the Minnesota court is clearly correct on the record in this case.

This Court has held that the fact that a shipping company went into a port of a State to discharge passengers and cargoes; that it had at that port agents who looked after the discharging of cargoes and passengers, did not result in the doing by the shipping company of a local business in that port.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, this court said at page 203.

> "As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another."

See *City of Sault Ste. Marie, v. International Transit Co.*, 234 U. S. 333.

Petitioner repeatedly states that respondent was operating its vessels over approximately ninety miles of water over which the State of Minnesota has *territorial* jurisdiction (Brief pp. 4, 12, 29), and takes the position that this fact places respondent in the same position as a railroad owning and operating trackage within the

territorial limits of Minnesota. The record does not show that the respondent operated over ninety miles of water over which the State of Minnesota has territorial jurisdiction. As pointed out on pages 4 and 5 of petitioner's Brief, Minnesota's jurisdiction and territorial limits are covered by two separate sections of the Minnesota Constitution. The first of these, Section 1, Article II, defines the boundaries of the State; the second, Section 2 of the same Article, gives to Minnesota certain *concurrent* jurisdiction *beyond* its boundaries. That portion of the record to which petitioner refers as supporting its statement, namely page 42, merely states that the attached vessel traversed approximately ninety miles of water over which Minnesota had *concurrent* jurisdiction. The attached vessel, up to the time of its attachment, had not come within the boundaries of Minnesota (R. 13).

As heretofore stated, petitioner's principal argument is that the respondent in this case was within Minnesota to the same extent as a railroad owning trackage and operating a railroad within the State, and relies upon the following language of Mr. Justice Loring in his dissenting opinion cited upon pages 24 and 25 of petitioner's Brief:

> "* * * I cannot see the distinction between operating a railroad into a state as did the Santa Fe in the Terte case and operating a line of steamships into one of its ports as in the case at bar."

This argument by petitioner is predicated upon the misinterpretation by petitioner of the affidavit of H. A. Carmichael, above referred to, for, as we have heretofore shown, the affidavit merely states that the respondent was operating over ninety miles of water over which Minnesota had concurrent jurisdiction.

In addition to the fact that petitioner in this branch of its argument has proceeded upon a misconception of facts in the record, there are further reasons why petitioner's contention that respondent was within Minnesota to the same extent as a railroad, is unsound. An analysis of the activities of a railroad owning and operating trackage within a State as compared with the activities of respondent, clearly shows differences both of fact and of applicable law.

The railroad operating in the State is there carrying on its principal function; it carries goods and passengers from point to point within the State. The respondent, on the other hand, carries on its principal function, namely, the carriage of goods by water in interstate commerce, on the navigable waters of the United States and goes within the boundaries of the State only so far as it is necessary, for obvious physical reasons, in order that it may deliver its cargoes to the State.

The railroad is operating over the land of the State and must secure its right to do this by purchase, lease, or condemnation. It is operating over territory over which the State has exclusive jurisdiction. The respondent, on the other hand, whether on waters within the boundaries of Minnesota, on waters without those boundaries but within the so-called concurrent jurisdiction of Minnesota, or whether on waters entirely outside any Minnesota jurisdiction, is operating upon the navigable waters of the United States which are free to commerce under the repeated decisions of this Court.

*Gibbons v. Ogden,* 9 Wheaton 1;

*Gilman v. Philadelphia,* 3 Wall. 713;

*Illinois Central R. Co. v. Illinois,* 146 U. S. 387;

*Gibson v. United States,* 166 U. S. 269;

*United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53;

*Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251.

It is clear that the State of Minnesota could not as a condition to the bringing of cargoes into its ports in interstate commerce over navigable waters of the United States within its jurisdiction, require the respondent to qualify under its foreign corporation laws and consent to be sued in Minnesota upon foreign causes of action. To say that operating on the navigable waters of the United States in interstate commerce, even within the boundaries of Minnesota, is tantamount to a consent to be sued in Minnesota upon foreign causes of action, would be to allow Minnesota to place a burden upon interstate commerce by indirection which this Court would not sustain if placed by direct legislation requiring express consent.

Furthermore, it is to be noted that a railroad operates on regular schedules within the State and continually has property permanently located within the State. The respondent, on the other hand, only goes to the State as it secures cargoes from other States destined to Minnesota. When, if ever, it may again go to Minnesota is a matter of conjecture. The fact that respondent had no permanence of presence not only appears from the affidavits and testimony in support of the Motion to Quash, but also from the fact that petitioner in this case did not wait for respondent to go within Minnesota territorial jurisdiction but attached the vessel while tied to a Wisconsin dock.

While it is true that the mere fact that the business carried on by a corporation is entirely interstate in character does not render that corporation immune from the

ordinary process of the courts of the State, *International Harvester Co. v. Kentucky,* 234 U. S. 579, it does not follow that the mere carrying on of some business in the State renders the foreign corporation amenable to suit upon all causes of action.

Thus in the case of *Louisville & Nashville R. Co. v. Chatters,* 279 U. S. 320, this court said:

> "Even when present and amenable to suit it may not, unless it has consented * * * be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction. * * * "

**To recapitulate**—It is submitted that the true doctrine regarding the maintenance of a suit against a foreign corporation, engaged in interstate commerce, in a jurisdiction unconnected with the cause of action, as enunciated by this Court in the Davis and succeeding cases, is that unless the foreign corporation has consented to be sued in the jurisdiction, or is there carrying on such business as to result in a consent to suit upon foreign causes of action, the maintenance of the suit constitutes an unreasonable burden upon interstate commerce. In the Davis, Wells, Mix and Terte (Rio Grande) cases where no facts from which the Court could infer a consent were present, jurisdiction was denied; whereas in the Hoffman case, where the defendant was sued in the State of its incorporation, and in the Terte case (Santa Fe) where defendant was sued where it had qualified to do business, each presenting clear cases of consent, this Court sustained jurisdiction. Respondent's operations in this case clearly are not such that a consent to be sued in Minnesota upon foreign causes of action may be implied, for, as shown above, its operations upon the navigable waters of the United States, even though within the boundaries of Minnesota,

cannot have this result. Its activities on land were less than those in the Terte case where the Rio Grande "maintains one or more offices in the state and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic". As stated by Mr. Justice Stone in the majority opinion in this case:

> "It (referring to the Rio Grande) was as much, but no more, out of Missouri in a physical sense and for all business purposes, as the defendant in the instant case is out of Minnesota" (R. 70).

## VII.

### The Judgment of the Supreme Court of Minnesota should be Affirmed.

We submit that the decision of the Supreme Court of Minnesota, sustaining the judgment of the trial court, that this case "comes squarely within the theory of the controlling decisions of the Supreme Court of the United States" (R. 68), is correct and should be affirmed by this Court.

Respectfully submitted,

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